The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

RYAN HARDY & MATTHEW O'CONNOR

v.

NEW HAMPSHIRE DEPARTMENT OF SAFETY & CHESTER ARMS, LLC

Docket No. 218-2018-CV-828

ORDER

Plaintiffs Ryan Hardy and Matthew O'Connor brought this action against Defendants Chester Arms, LLC ("Chester Arms") and the New Hampshire Department of Safety ("NHDOS"), asserting claims for negligent entrustment and negligence per se. See Doc. 1 (Compl.). On February 11, 2022, the Court granted motions for summary judgment filed by the defendants, finding both defendants immune from liability in this action. Plaintiffs now move for reconsideration. See Docs. 89 (Pls.' Mot. Reconsider as to Chester Arms) and 90 (Pls.' Mot. Reconsider as to NHDOS). For the reasons that follow, Plaintiffs' motions for reconsideration are DENIED.

Factual Background

The Court re-asserts the following facts as set forth in its original order on summary judgment. Chester Arms is a Federal Firearms Licensee ("FFL") with a retail location in Derry, New Hampshire. See Doc. 59 (Consol. State. Material Facts – Chester Arms) ¶ 1. On March 19, 2016, Ian MacPherson sought to purchase a gun from Chester Arms. Id. ¶ 8. Mr. MacPherson eventually decided to purchase a Smith & Wesson, Model SD40VE, .40 caliber semi-automatic pistol (the "Pistol"). Id. ¶ 12. He

also attempted to purchase a fifty-round box of Magtech, .40 caliber target ammunition. Id. ¶ 14. In order to proceed with the sale, a Chester Arms employee asked Mr. MacPherson to provide a form of identification and to complete Bureau of Alcohol Tobacco and Firearms ("ATF") Form 4473. Id. ¶ 15. ATF Form 4473 requires potential firearms buyers from FFL dealers to provide the purchaser's name, date of birth, address, and other identifying information. Doc. 82 (Consol. State. Material Facts – NHDOS) ¶¶ 3, 5. Mr. MacPherson initially provided a previous address on the ATF Form 4473, along with his identification card. Doc. 59 ¶¶ 15–16. After noticing the form had the wrong address, the employee shredded the first form and required Mr. MacPherson to fill out another form with his current address. Id. ¶¶ 16, 18. Mr. MacPherson complied and filled out a second form. Id. ¶ 17.

After Mr. MacPherson completed the new form, the employee contacted NHDOS's Permits and Licensing Unit, known as the Gun Line, to complete the required background check. Id. ¶¶ 5, 19. "Pursuant to state law, the Gun Line is partial point of contact in . . . New Hampshire for the federal National Instant Criminal Background Check System ("NICS")." Doc. 82 ¶ 8. "NICS is a national system that checks available records to determine if prospective firearm transferees are disqualified from receipt of firearms." Id. ¶ 9. In New Hampshire, all potential firearms transferees seeking to purchase a handgun from a FFL are required to undergo an NICS background check. Id. ¶ 11. Based on federal law, the Gun Line may approve, deny, or delay a firearm transfer. Id. ¶ 13.

In this case, the Gun Line did not provide an immediate response to Chester Arms' inquiry. Doc. 59 ¶ 20. After nearly a half an hour, the Gun Line informed the

Chester Arms employee that the sale was given a "delay" status. Id. ¶ 68. The employee asked the Gun Line for the reason for the delay, but the Gun Line informed her that it could not provide her such information. Id. ¶ 69. The employee informed Mr. MacPherson the transaction was delayed, which meant that it would take several more days to process. Doc. 59 ¶ 72. Indeed, once the transaction is put on a "delay" status, a FFL is required to wait until after three business days before it may proceed with the transaction. Doc. 82 ¶ 23. The employee offered to take Mr. MacPherson's phone number to call him if the sale could be completed. Doc. 59 ¶ 72. Mr. MacPherson asked for a receipt, took a Chester Arms business card, and provided his phone number before leaving the store. Id. ¶ 73.

In fact, the Gun Line delayed the transfer to conduct further research regarding Mr. MacPherson's misdemeanor crimes of domestic violence in order to determine whether they met the requisite victim relationship to disqualify him from purchasing a firearm. Doc. 82 ¶¶ 19–21. On March 23, 2016, the Gun Line sent a fax to the Merrimack Police Department (the "MPD") requesting information related to three simple assault arrests and a disorderly conduct arrest found during its search. Doc. 82 ¶ 24. The MPD responded by faxing police reports concerning the criminal charges. Id. ¶ 25. The reports showed that none of Mr. MacPherson's "NICS hits" disqualified him from taking possession of the firearm because they did not meet a victim relationship requirement prescribed by federal law. Id. ¶ 26.

Also on March 23, 2016, the Gun Line sent a fax to Merrimack District Court asking for docket information concerning the criminal charges. Id. ¶ 27. The next day, Detective Scott Park of the MPD sent the Gun Line a fax stating:

> Merrimack Police have been made aware that [Mr. MacPherson] has attempted to purchase a firearm at a retail outlet in Chester. Merrimack Police have had many dealings with [Mr.] MacPherson to including having been made aware through family members that he has been diagnosed with schizophrenia. [Mr.] MacPherson has displayed on many occasions delusional behavior which should serve as significant concern should he obtain a firearm.

Id. ¶ 30. However, the Gun Line was unable to obtain supporting documentation regarding Mr. MacPherson's mental health diagnosis. Id. ¶ 61. On March 29, 2016, the Gun Line received case summaries from the Merrimack District Court concerning the criminal charges. Id. ¶ 32. The case summaries showed Mr. MacPherson had been found or pled guilty to all the charges which produced NICS hits and that he had once been evaluated for competence to stand trial but was allowed to enter a plea after that evaluation. Id. ¶¶ 32–38.

While the delay was still in place but after the required three business days, on April 1, 2016, Mr. MacPherson returned to Chester Arms. Doc. 59 ¶ 80. Chester Arms' owner required Mr. MacPherson to complete another ATF Form 4473 due to an incorrect date on the previous form. Id. ¶¶ 84, 86. Thereafter, Chester Arms transferred the firearm to Mr. MacPherson. Id. ¶ 86. Over a month later, on May 13, 2016, Mr. MacPherson used the firearm to shoot Plaintiffs, who are both Manchester police officers. Id. ¶ 91. After the shooting, ATF agents obtained Mr. MacPherson's ATF Form 4473 from Chester Arms. Id. ¶ 93. The Gun Line continued the delay status on Mr. MacPherson's transaction until the day he was indicted for the shooting, at which point the Gun Line changed the status to denied. Id. ¶ 97. Neither Chester Arms nor any Chester Arms employee was ever charged, indicted, or convicted of any state or federal crimes related to the transfer of the firearm to Mr. MacPherson. Id. ¶ 89.

Analysis

I. Chester Arms

In granting Chester Arms' motion for summary judgment, the Court found that the defendant was entitled to immunity pursuant to RSA 508:21. The Court also determined that RSA 508:21 was constitutional. Plaintiffs move for reconsideration on the grounds that: (1) the Protection of Lawful Commerce in Arms Act ("PLCAA") preempts RSA 508:21; (2) RSA 508:21 is unconstitutional; and (3) this action is not a "qualified civil liability action" as defined in RSA 508:21. Plaintiffs also argue there exist contested material facts in this case that ought to have precluded summary judgment. The Court will address each argument in turn.

1. PLCAA Preemption

The PLCAA provides that "[a] qualified civil liability action may not be brought in any Federal or State Court." 15 U.S.C. § 7902(a). The statute defines "qualified civil liability action" as "a civil action . . . brought by any person against a manufacturer or seller of a qualified product . . . for damages . . . resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." 15 U.S.C. § 7903(5)(A). The statute exempts certain causes of action from this definition, including "an action brought against a seller for negligent entrustment or negligence per se." Id. § 7903(5)(A)(ii). Therefore, under the PLCAA, Chester Arms would not be entitled to immunity.

Similar to the PLCAA, RSA 508:21, II provides that "[a] qualified civil liability action shall not be brought in any state court." RSA 508:21, I(d) also similarly defines "qualified civil liability action" as "a civil action, in law or in equity, brought against a

manufacturer or seller . . . of a qualified product, for damages resulting from the criminal or unlawful use of a qualified product by the person or a third party." However, RSA 508:21 diverges from the PLCAA in that the only exception to the definition of a "qualified civil liability action" is "an action brought against a . . . seller . . . convicted of a felony under state or federal law, by a party directly harmed by the felonious conduct." RSA 508:21, I(d). Because Chester Arms does not fall within this exception, it is entitled to immunity under RSA 508:21.

"The federal preemption doctrine is based upon the Supremacy Clause of the United States Constitution," which provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." In re Braunstein, 173 N.H. 38, 41 (2020); U.S. CONST. art. VI, cl. 2. "There can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress." Braunstein, 173 N.H. at 41.

"Pre-emption may be either express or implied." Id. "Even without an express provision for preemption, state law must yield to a congressional Act in at least two circumstances." Id. "When Congress intends federal law to occupy the field, state law in that area is preempted." Id. "And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute." Id. "An actual conflict exists when it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. "The 'obstacle' branch of conflict preemption requires more than a showing that some

tension between the state and federal laws exists." Finn v. Ballentine Partners, LLC, 169 N.H. 128, 139–40 (2016). "A party must show that the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." Id. at 140.

There is no dispute that the PLCAA does not contain any express preemption language. Plaintiffs instead argue that the PLCAA preempts RSA 508:21 both on the basis of field preemption and due to the fact that the two statutes conflict because they do not contain identical exceptions. First, however, there is nothing in the plain language of the PLCAA that indicates an intent to occupy the field.

> [A]n intent to occupy the field exclusively may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for States to supplement it, or where an Act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

Wenners v. Great States Beverages, Inc., 140 N.H. 100, 103–04 (1995) (quoting English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990)). Plaintiffs argue that an intent to occupy the field may be inferred from the fact that the PLCAA's purpose is to prohibit causes of action against sellers of firearms for harm caused by the criminal acts of third parties, and the statute exempts a limited number of causes of action, including a claim for negligent entrustment. The Court disagrees.

"Addressing only immunity for manufacturers and sellers of firearms and ammunition from claims based on harm caused by third parties, the PLCAA does not represent a comprehensive regulatory scheme." Phillips v. Lucky Gunner, LLC, 84 F. Supp. 3d 1216, 1227 (D. Colo. 2015). As Plaintiffs themselves acknowledge, the PLCAA does not specifically create a private cause of action for negligent entrustment

against a licensed seller of firearms. See 15 U.S.C. § 7903(5)(C) ("[N]o provision of this chapter shall be construed to create a public or private cause of action or remedy."). Rather, it merely provides that such a cause of action, to the extent it is recognized in a given jurisdiction, would not be barred by the PLCAA. By including exceptions, the PLCAA tacitly invites supplementation by state laws that offer more protection than the federal statute. New Hampshire is one of many jurisdictions that have done just that. See, e.g., Alaska Stat. § 09.65.270; Arkansas Code Ann. § 14-54-1411; Colo. Rev. Stat. §13-21-501 et seq.; Del. Code Ann. Title 11 §1448A; Fla. Stat. §790.331; S.D. Cod. Laws §21-58-2.

Further, by prohibiting a claim for negligent entrustment, RSA 508:21 does not conflict with the PLCAA but instead supplements it by expanding the scope of the immunity granted to licensed sellers of firearms, among others. Rather than posing an obstacle, expanded immunity furthers the identified purposes of the PLCAA, which include:

> (1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.
>
> (2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

15 U.S.C. § 7901(b); see Phillips, 84 F. Supp. 3d at 1227 ("While the Colorado Immunity Statute provides greater protection for sellers than the PLCAA, it does not interfere with federal policy in any material way."). Therefore, because the PLCAA does not preempt

the entire field, and because the state and federal laws do not conflict with one another, RSA 508:21 is not preempted by the PLCAA.

2. Constitutionality of RSA 508:21

Plaintiffs maintain that RSA 508:21 is unconstitutional as applied in this case because it: (1) deprives them of all remedies in violation of both the New Hampshire Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution; (2) violates the Equal Protection Clause; and (3) does not meet the intermediate scrutiny standard.

In finding that RSA 508:21 did not violate Part I, Article 14 of the New Hampshire Constitution, the Court cited extensively to Huckins v. McSweeney, 166 N.H. 176 (2014). Plaintiffs maintain this was in error, arguing that Huckins is inapposite as it involved municipal immunity, whereas RSA 508:21 grants immunity to a private entity. The Court is unpersuaded.

First, it is unclear the relevance of the distinction between municipal immunity and the immunity granted to Chester Arms under RSA 508:21. Whether granted to a government entity or a private individual, the interplay of immunity and Part I, Article 14 as articulated in Huckins is the same. Although Plaintiffs argue that RSA 508:21 is not an immunity statute because it does not contained the word "immunity," the Court disagrees. Many jurisdictions characterize the nearly identical prohibition of qualified civil liability actions in the PLCAA as a grant of immunity, despite the absence of that word in the statute. See Travieso v. Glock Inc., 526 F. Supp. 3d 533, 537 (D. Arizona 2021); Phillips v. Lucky Gunner, LLC, 84 F. Supp. 3d 1216, 1223–24 (D. Colo. 2015); City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 398 (2nd Cir. 2008). Moreover,

as noted by Chester Arms, New Hampshire has characterized similar statutes prohibiting civil actions as immunity statutes even when they do not use the word "immunity." See Cecere v. Loon Mtn. Recreation Corp., 155 N.H. 289, 291 (2007) (characterizing RSA 225-A:24, I, which states that certain persons "may not maintain an action against" ski area operators, as "an immunity provision"). Therefore, RSA 508:21 constitutes an immunity provision[1] and the immunity analysis set forth in Huckins is applicable to the instant case.

Plaintiffs next argue that Huckins involved a claim for battery brought against a police officer directly and against the town that employed him under a theory of *respondeat superior*, whereas here a potential claim against Mr. MacPherson would not involve the same cause of action as its claim against Chester Arms. Plaintiffs thus appear to argue that Huckins only applies where the available remedy is identical to the one barred by an immunity provision. However, no part of the holding in Huckins was dependent on the claim against both defendants being the same, and Plaintiffs cite no other authority in support of their claim.

Plaintiffs next appear to argue that they must be able to bring a negligent entrustment action against Chester Arms because any tort claim against Mr. MacPherson would be ultimately unsuccessful either due to Mr. MacPherson being found incompetent or for some other reason.[2] However, "[t]he purpose of [Pt. I, Art. 14]

[1] Incidentally, the Court also notes that, prior to adopting their present argument, Plaintiffs themselves stated that "[t]he statute at issue here involves granting a private entity . . . immunity." Doc. 89 ¶ 10.

[2] In their reply, Plaintiffs articulate a purely hypothetical sequence of events arising from the fact that Mr. MacPherson denied shooting Plaintiffs during a police interview. Plaintiffs suggest that because Mr. MacPherson denied being involved in a shooting, it *might* be found that he lacked an intent to harm Plaintiffs, which would result in no tort liability. This hypothetical scenario is not sufficient to find a violation of Part I, Article 14.

is to make civil remedies available and to guard against arbitrary and discriminatory infringements upon access to the courts." Huckins, 166 N.H. at 180. "The right to a remedy is not a fundamental right, but is relative and does not prohibit all impairments of the rights of access." Id. Further, "Part I, Article 14 does *not* guarantee that all injured persons will receive full compensation for their injuries." Id. While a claim against Mr. MacPherson may ultimately be unsuccessful, or may result in an unrecoverable award of damages due to Mr. MacPherson's insolvency, the availability of that course of action satisfies Plaintiffs' constitutional rights.

Plaintiffs next argue that in addressing the constitutionality of RSA 508:21, the Court erred in considering the statute's legislative history. In its prior order, the Court found that the constitutionality of RSA 508:21 was subject to intermediate scrutiny. To meet its burden under intermediate scrutiny, the government "may not rely upon justifications that are hypothesized or invented *post hoc* in response to litigation, nor upon overbroad generalizations." Cmty. Res. for Justice, Inc. v. City of Manchester, 154 N.H. 748, 762 (2007). In order to determine whether the articulated justification for the law is genuine and not invented in response to the instant litigation, the Court must look to the legislative history. Cf. Guare v. State, 167 N.H. 658, 668 (2015) (looking to legislative history to determine legislature's actual intent in passing challenged voting rights law). Therefore, the Court's consideration of the legislative history was proper.[3]

[3] Moreover, the reference was to a single sentence, which stated that "[t]his bill will protect firearm manufacturers and dealers from suit over the criminal use of the manufacturer[']s non-defective product." This same purpose can be readily gleaned from the language of the statute itself, as its entire function is to provide immunity to firearm dealers, among others, for the unlawful use of a firearm by a third party. Therefore, to the extent reference to the legislative history was improper, it was harmless.

Plaintiffs appear to argue that even if the Court considers the legislative history, the language relied upon, which included reference to a "non-defective product," is unreliable because it "suggest[s] that if a product were defective, that would be an exception where suit could be brought" even though "[t]here is no mention of any exception in the text of R.S.A. 508:21." Doc. 89 ¶ 12. As noted above, RSA 508:21 prohibits qualified civil liability actions from being brought in New Hampshire courts. A "qualified civil liability action" is "a civil action, in law or in equity, brought against a manufacturer or seller . . . of a qualified product, *for damages resulting from the criminal or unlawful use of a qualified product by the person or a third party*." RSA 508:21, I(d) (emphasis added). If the damages resulted from a defective firearm, a resulting action would not be a "qualified civil liability action," and would not be subject to the statute's immunity provision. Therefore, a reference to non-defective products in the legislative history does not undermine the Court's reasoning in any way. Further, the Court notes that in its official findings in the PLCAA, Congress also made reference to firearms that operate or function as designed and intended. 15 U.S.C. § 7901(a)(3), (5).

Plaintiffs finally argue the Court erred in finding that RSA 508:21 furthers the important governmental interest in protecting the rights of New Hampshire citizens "to keep and bear arms in defense of themselves, their property, and the state." N.H. CONST. pt. 1, art. 2-a. Plaintiffs maintain that "[t]his purported justification cannot explain the impermissible discrimination between victims of gun violence and similarly situated victims of violence committed with other instruments." Doc. 89 ¶ 14. Plaintiffs further argue that "[t]he Second Amendment does not confer a right upon a firearms dealer to knowingly supply a firearm to a dangerous, mentally ill individual like Ian MacPherson."

Id. Plaintiffs do not elaborate further on this issue or identify any law or facts that the Court overlooked or misapprehended.

3. Qualified Civil Liability Action

Plaintiffs argue that this case does not constitute a "qualified civil liability action" as defined in RSA 508:21. As set forth above, a "qualified civil liability action" is "a civil action, in law or in equity, brought against a manufacturer or seller . . . of a qualified product, for damages resulting from the criminal or unlawful use of a qualified product by the person or a third party." RSA 508:21, I(d). Plaintiffs argue their claim for negligent entrustment falls outside of this definition, as their claim "is an independent and distinct cause of action relating to the actions and omissions of the licensee on March 19, 2016 and on April 1, 2016, well before the criminal or unlawful actions of Ian MacPherson." Doc. 89 ¶ 15. In other words, Plaintiffs appear to maintain that their claim begins and ends with Chester Arms' sale of the firearm to Mr. MacPherson, and does not "result[] from the criminal or unlawful use" of the firearm by Mr. MacPherson afterward.

This argument is unavailing. As noted by Chester Arms, Plaintiffs' damages are the result of being shot by Mr. MacPherson; absent these damages, Plaintiffs would never have brought the instant action. Taking the unlawful shooting and the resulting damages to Plaintiffs out of the equation would cause Plaintiffs to lack standing to bring any claim of negligent entrustment against Chester Arms. Therefore, Plaintiffs' injuries are by definition "damages resulting from the criminal or unlawful use" of a firearm by a third party. Accordingly, Plaintiffs' claim against Chester Arms for these damages falls squarely within the definition of a "qualified civil liability action."

4. Contested Material Facts

Plaintiffs finally identify a number of contested facts they claim are material to the outcome of this litigation, making summary judgment improper. For example, Plaintiffs claim there is a question of fact as to whether: (1) NHDOS urged Chester Arms not to sell the firearm to Mr. MacPherson; and (2) Chester Arms employee Jennifer Cavaretta explained anything about the 4473 Form to Mr. MacPherson. The first allegedly contested fact is not material as it does not impact whether Chester Arms is entitled to immunity under RSA 508:21. Even assuming a Gun Line employee urged Chester Arms not to sell the weapon, the transfer of the firearm to Mr. MacPherson on April 1 was lawful as it occurred more than three business days after Mr. MacPherson was placed on Delayed status.

The second allegedly contested "fact" appears to be pure speculation on Plaintiffs' part. Plaintiffs point to some missing surveillance footage from Chester Arms' store while Mr. MacPherson was filling out the form and claim that Chester Arms employee Jennifer Cavaretta testified "that she did not recall explaining anything about the [ATF 4473 Form] to Mr. MacPherson during his purchase." Doc. 89 ¶ 16. Plaintiffs maintain that depending on what Ms. Cavaretta and Mr. MacPherson discussed in connection with the form, "the sale could be construed as an illegal sale where Ian MacPherson listed an incorrect address and he inaccurately answered questions about his mental health." Id.

Ms. Cavaretta testified that she "[didn't] recall if [Mr. MacPherson] asked [her] any questions about the form." Doc. 89, Ex. 4 at 16:15–15. However, she also testified that her typical practice is to answer any questions the purchaser has, but that

customers did not typically ask questions about the meaning of the language on the form. Id. at 16:12–23; 17:1–6. Moreover, the fact remains that even if some aspect of the sale was unlawful as a result of Mr. MacPherson providing inaccurate information on the form, RSA 508:21 would fail to provide immunity only where Chester Arms committed an unlawful act in connection with the sale and was convicted of a felony for same. See RSA 508:21, I(d).

Accordingly, based on the foregoing, Plaintiff's motion to reconsider with respect to Chester Arms is DENIED.

II. NHDOS

In granting summary judgment for NHDOS, the Court found that the Gun Line was entitled to sovereign immunity pursuant to RSA 514-B:19, I(b), as its employees acted with due care when investigating Mr. MacPherson's application. Plaintiffs move for reconsideration on the following grounds: (1) the Court erroneously relied on RSA 126-AA:2 in its analysis; (2) the Court erred in finding that NHDOS exercised due care; (3) the Court erred in finding that NHDOS was entitled to immunity; (4) the Court employed the improper legal standard when it suggested that Plaintiffs needed to show recklessness on the part of NHDOS; and (5) questions of material fact exist that preclude summary judgment on these issues. The Court shall address each argument in turn.

1. Applicability of RSA 126-AA:2

In its prior order, the Court relied in part on a provision within RSA 126-AA:2 in analyzing whether Gun Line employees acted with due care when investigating Mr.

MacPherson's mental illness. Specifically, the Court quoted RSA 126-AA:2, VI, which provides:

> No person, organization, department, or agency shall submit the name of any person to the [NICS] on the basis that the person has been adjudicated a "mental defective" or has been committed to a mental institution, except pursuant to a court order issued following a hearing in which the person participated and was represented by an attorney.

The Court noted that the Gun Line could have possibly taken the extra step of instituting an action under this provision, but that competing considerations meant that its failure to do so did not constitute a lack of due care.

Plaintiffs now correctly note that RSA 126-AA:2 did not go into effect until June 28, 2018, more than two years after Mr. MacPherson purchased the firearm from Chester Arms. Because the statute could not have been used to evaluate conduct that occurred prior to its passage, the Court erred in relying upon it. NHDOS responds, however, that the language from RSA 126-AA:2, VI was previously codified at RSA 126-A:5, XXX(e), which, as Plaintiffs note, went into effect on April 5, 2016—after Chester Arms sold the firearm to Mr. MacPherson. NHDOS nevertheless maintains that the provision remains applicable because the Gun Line was still investigating Mr. MacPherson's eligibility to purchase a firearm at that time, and, moreover, the statute was in effect at the time of the shooting on May 16, 2016.

"A 'Delayed' response to the FFL indicates that it would be unlawful to transfer the firearm until receipt of a follow-up 'Proceed' response from the NICS or the expiration of three business days, whichever occurs first." 28 C.F.R. § 25.2. In this case, Mr. MacPherson attempted to purchase his firearm on March 19, 2016. That same day, the Gun Line was contacted and issued a Delayed response. The

application remained in Delayed status when Mr. MacPherson returned on April 1, 2016, at which time Chester Arms lawfully transferred the firearm to him. All of this occurred before RSA 126-A:5, XXX(e) went into effect. Because the passage of three business days without a "Denied" response from the Gun Line allows the seller to transfer the firearm, the determination of whether Gun Line employees acted with due care in this case must focus on the period from March 19, when Mr. MacPherson first came to Chester Arms to purchase a gun, to April 1, 2016, when Chester Arms lawfully transferred to him the firearm. Since the statute at issue went into effect April 5, 2016, it is inapplicable and will not be considered in analyzing whether Gun Lines employees exercised due care.

That being said, for the reasons set forth below, the Court's finding of due care in the Gun Line's investigation of Mr. MacPherson's eligibility to purchase a firearm remains unchanged.

2. Due Care

The gravamen of Plaintiffs' arguments with respect to the Court's finding of due care is that the Gun Line did not take adequate steps to investigate the evidence they had that indicated Mr. MacPherson had a history of mental health issues. For example, Plaintiffs argue that the Court erred in finding that the Gun Line asked the district court for records relevant to Mr. MacPherson's mental health evaluation referenced in the case summary they received. The Court disagrees. During her deposition, Gun Line employee Tiffany Foss testified:

> Q: I appreciate that what you are telling us, you got case summaries from the district court and there is one entry about a psychological competency assessment, correct?
> A: Correct.

> Q: Other than that, did you actually get the court records?
> A: We cannot get those court records. *I was told they don't disclose that information*.
> Q: Who told you that?
> A: I believe it was somebody from the court.

Doc. 71, Ex. 2 at 39:8–13 (emphasis added).

> So we did go, and we asked, we asked then Sergeant Haggerty [about Mr. MacPherson's IEA.] There really wasn't much we could do other than keep asking if there was anything that we could get from the court, and the court wasn't going to give us anything more than what we had already gotten.

Id. at 49:16–21. "There was enough information for us to believe there was something else we needed to look for or try to get, yet there was nothing that was being produced to us at that time, which put him into a remain delay status." Id. at 54:22–23; 55:1–3. This testimony demonstrates that the Gun Line had made inquiries of the court and been told that no further documentation would be provided.

Moreover, when speaking to the police after the shooting occurred, the Gun Line stated that it had "requested court documents relating to a simple assault and a disorderly conduct charge on MACPHERSON and is still waiting to receive them." Doc. 90, Ex. 7. Because the case summary referencing Mr. MacPherson's competency evaluation had already been received prior to April 1, 2016, this comment indicates that the Gun Line subsequently requested additional information from the court that it had not yet received.

Plaintiffs claim that "Tiffany Foss admitted that nothing was done by Gun Line after March 24, 2016, which was the day that Gun Line learned about Ian MacPherson's mental health concerns." Doc. 90 ¶ 11. This statement is inaccurate and misleading. Ms. Foss testified that her office would have tried to keep working on the case and that

she did not recall whether her office was able to follow up on the efforts to gain a mental health history for Mr. MacPherson. Id., Ex. 8 at 53:16–23; 54:1. Plaintiffs' argument that the Gun Line did nothing after March 24, 2016, appears to be based on the fact that there were no further entries in its file on Mr. MacPherson after that date. However, Ms. Foss testified that verbal communications with outside entities, such as the district court, would only be documented if something was produced as a result. Id. at 54:2–15. Therefore, the absence of a notation in the file does not indicate that nothing was done.

In addition to requesting additional information from the courts, Plaintiffs argue the Gun Line could have requested aid from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). See Doc. 90, Ex. 4. However, the Gun Line had no reason to do so, as there is no indication that ATF would have access to Mr. MacPherson's mental health records or be able to produce other responsive information. The failure to reach out to an organization with no discernable ability to provide assistance cannot support a finding that the Gun Line failed to exercise due care.

Plaintiffs also argue the Gun Line could have obtained records from Detective Scott Park indicating that Mr. MacPherson had been subjected to an IEA in 2007. Specifically, Detective Park had access to a police report that stated Mr. MacPherson was involuntarily committed to the New Hampshire State Hospital. See Doc. 90, Ex. 9; Ex. 6 at 92:15–23; 93:1. However, Detective Park never indicated to the Gun Line that such records existed; he only ever informed them that Mr. MacPherson had been diagnosed with schizophrenia. Because Detective Park reached out to the Gun Line of his own accord, it would be reasonable to assume that he had relayed all of the information he knew at the time.

Moreover, even assuming the Gun Line had learned of the 2007 IEA through Detective Park, Tiffany Foss testified that a reference to an IEA in a record without court documentation was not enough for her to substantiate a denial pursuant to Section 922(g)(4). Doc. 71, Ex. 2 at 47:17–23; 48:1–13. As set forth in more detail below, the 2007 IEA does not appear to meet the definition of "committed to a mental institution" pursuant to 27 C.F.R. § 478.11.

Plaintiffs maintain that had the Gun Line employees discovered the available information regarding Mr. MacPherson's mental health history, it would have resulted in a denial of his application. In support, they cite to the following example contained in the NICS Law Enforcement Guide:

> John Doe is diagnosed as **mentally unstable**, and as an officer you have knowledge of a court-ordered **involuntary commitment for treatment**, but you do not have immediate access to the supporting documentation. The order is for treatment and not just evaluation. No criminal history exists relating to this information. You can submit the information for entry into the NICS Index, which will result in the immediate denial of an attempted firearm purchase.

Doc. 90, Ex. 2 at 13 (emphasis in original). This example explicitly notes that an involuntary commitment only serves to bar the purchase of a firearm if the commitment was both court-ordered *and* done for the purposes of treatment. This is consistent with the definition of "committed to a mental institution" set forth in the federal regulations, which includes an involuntary commitment, but "does not include a person in a mental institution for observation." 27 C.F.R. § 478.11. While Mr. MacPherson was subject to an IEA in May 2007, there is no evidence in the record that he received treatment during his commitment. In fact, the record indicates the contrary.

A May 18, 2007 psychiatric progress note from Mr. MacPherson's IEA, describing his stay and general behavior at the hospital, was made "in context of [the physician] observing his behavior on the unit and without giving him any medications." Doc. 104, Ex. 5. Up to that point in time, Mr. MacPherson's involuntary commitment had not resulted in treatment. In fact, the doctor stated that "there is no sense that [Mr. MacPherson] has a major mental illness that needs treatment with any medication." Id.

The progress note also indicates that Mr. MacPherson "will be going to his IEA hearing on Monday." Id. This hearing would have been the one required by RSA 135-C:31, which only requires the Court "to determine if there was probable cause for involuntary emergency admission." As the NHDOS notes, no substantive adjudication of Mr. MacPherson's mental state would have occurred at such a hearing. Moreover, the record does not reflect that the hearing actually happened or whether additional formal adjudication of Mr. MacPherson's mental status occurred after this point. Therefore, even had the Gun Line obtained these records, it would not have had a valid basis to deny Mr. MacPherson's application. See United States v. Rehlander, 666 F.3d 45, 49 (1st Cir. 2012) ("[W]e now conclude that section 922 should not be read to encompass a temporary hospitalization attended only by . . . ex parte procedures . . . .").

In addition, the 2012 case summary the Gun Line received from the Merrimack District Court only indicated that Mr. MacPherson had been ordered to undergo a competency *evaluation* in connection with that case. Doc. 71, Ex. 19 at 47. The same records also indicated that Mr. MacPherson entered a plea less than one month after the competency hearing, which he would not have been able to do if he had been found incompetent. Id. at 48. Therefore, the Merrimack District Court records did not indicate

that Mr. MacPherson had either been committed to a mental institution or adjudicated as a mental defective, nor did it indicate that further relevant information would be found in the court's file.

Finally, although Plaintiffs did not call specific attention to it in their motion for reconsideration, Mr. MacPherson was subject to some mental health evaluation and/or treatment at Mount Sinai Hospital in Chicago, Illinois in 2014. However, his discharge summary explicitly notes that he was "admitted from the emergency room, where he had come in on his own, seeking hospitalization." Doc. 70, Ex. 15. His admission was therefore voluntary and explicitly exempted from the definition of "committed to a mental institution." See 27 C.F.R. § 478.11.

Accordingly, for the foregoing reasons, the Court reiterates its finding that the Gun Line exercised due care in the discharge of its duties in this case.

3. Immunity

Plaintiffs argue that the Court erred in finding that the NHDOS qualified for immunity under RSA 541-B:19, I(b). For the reasons set forth above, however, the Court disagrees. As a Point of Contact for the federal government, the Gun Line was required to: (1) receive NICS background check requests from FFLs; (2) check state or local record systems, perform NICS inquiries, and determine whether matching records provide information demonstrating that an individual is disqualified from possession a firearm under Federal or state law; and (4) respond to FFLs with the result of a NICS background check. 28 C.F.R. § 25.2; RSA 159-D:1. The Court previously found that the Gun Line acted with due care in carrying out these duties by placing Mr. MacPherson on Delayed status and conducting a follow-up investigation with respect to

Mr. MacPherson's mental health history. Plaintiffs have failed to present any facts or law the Court overlooked or misapprehended that would cause the Court to reconsider this finding. Because the Gun Line exercised due care in the execution of its duties, and because the record does not show the existence of any documentation that would have disqualified Mr. MacPherson from purchasing a firearm, the Gun Line is entitled to immunity under RSA 541-B:19, I(b).

4. Recklessness

The Court indicated that the Gun Line must be held to a higher standard than mere negligence based on its review of relevant New Hampshire case law. As set forth in the prior order on summary judgment, "[t]he test of due care is what reasonable prudence would require under similar circumstances." Caliri v. State Dep't of Transp., 136 N.H. 606, 610 (1993). "For immunity purposes, the failure to act 'reasonably' must connote more than mere negligent actions." Farrelly v. City of Concord, 168 N.H. 430, 445 (2015). "If it did not, immunity would serve to purpose because if an official were not negligent, he would not be liable at all and there would be no need for immunity." Id. "For the added protection of official immunity to serve any purpose, then, the lack of a 'reasonable believe' in this context necessarily must mean more than mere negligence." Id.

Plaintiffs argue the Court's reliance on Farrelly was in error because Farrelly involved municipal immunity and "New Hampshire jurisprudence does not support the assertion that claims against the State . . . must be reckless or wanton." Doc. 90 ¶ 8. The Court disagrees.

Citing Huckins, the Farrelly Court noted that RSA 507-B:2 and RSA 507-B:5 "provide immunity to municipalities for any intentional tort committed by a municipal employee under the same terms and conditions as RSA 541-B:19 provides sovereign immunity to the State for any intentional tort committed by a State employee." 168 N.H. at 443. "That is, to have immunity, the official must have acted within the scope of his official duties and have reasonably believed, at the time of the acts or omissions complained of, that his conduct was lawful." Id. The Court agreed with the plaintiff's argument that "official immunity must be subject to the same constitutional requirements as those we articulated in Huckins with respect to RSA chapter 507-B and RSA 541-B:19." Id. It is against this backdrop that the Court interpreted "reasonably" in the language quoted above. Therefore, while Farrelly did involve municipal immunity, it is apparent that sovereign immunity would be held to the same standard. Nevertheless, even accepting Plaintiffs' argument that the proper standard to hold the NHDOS employees to was that of simple negligence, because no disqualifying information has ever been presented in the record, the NHDOS could not be found to have acted negligently in failing to change Mr. MacPherson's status to Denied.

Plaintiffs also argue that summary judgment is not appropriate due to the fact that the determination of whether an individual or entity acted negligently, recklessly, or wantonly is a question of fact reserved for the jury. However, as the Court set forth in its original order, and as the NHDOS notes in its objection, the purpose of immunity is to avoid going to trial in the first place. See Everitt v. Gen. Elec. Co., 156 N.H. 202, 221 (2007) ("[T]he purpose of immunity is to operate as a bar to a lawsuit, rather than as a

mere defense against liability, and is effectively lost if a case is erroneously permitted to go to trial."). Therefore, summary judgment was appropriately entered in this case.

5. Questions of Material Fact

Plaintiffs argue there is a dispute of fact over whether the Gun Line urged Chester Arms not to sell a firearm to Mr. MacPherson. However, whether it did or not is not material to the issue at hand. The Gun Line's function is a narrow one: upon request from a federal firearms licensee, it either approves, denies, or delays transaction after performing a background check. 28 C.F.R. § 25.2. Beyond issuing a Delayed status notification, the Gun Line has no responsibility to caution or warn a seller about a customer, and Chester Arms would have no obligation to heed any warning received from the Gun Line, so long as Mr. MacPherson remained in Delayed status. Because the Gun Line never obtained sufficient information to deny Mr. MacPherson's application, any failure to caution Chester Arms about Mr. MacPherson cannot demonstrate a lack of due care.

Accordingly, for the foregoing reasons, Plaintiff's motion to reconsider with respect to the NHDOS is DENIED.

SO ORDERED.

Date: May 16, 2022

Hon. David W. Ruoff
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 05/17/2022